UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOSE RAMON SANDOVAL,

Plaintiff,

vs.

SECRETARY OF THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,

Defendant.

CASE NO. 06CV2814-LAB (JMA)

ORDER REJECTING REPORT & RECOMMENDATION AND DENYING HABEAS PETITION

[Dkt No. 5]

I. INTRODUCTION

Jose Ramon Sandoval ("Sandoval" or "Petitioner"), proceeding *pro se* with his 28 U.S.C. § 2254 habeas corpus petition, asserts one ground for relief, alleging the trial judge at his December 2, 2003 sentencing infringed his due process rights by imposing an eight-year upper term sentence for his forcible rape conviction, for a total sentence of 12 years, in violation of Blakely v. Washington, 542 U.S. 296 (2004). He alleges "the trial court improperly relied upon facts neither admitted by Sandoval nor found by a jury." Pet. 4:20-22. He seeks habeas relief in the form of release from custody, or either "(a) a new trial on the aggravating factors for imposition of an upper term, or (b) in the interests of judicial economy, immediately resentence SANDOVAL to the middle term of 6 years, for an aggregate sentence of 10 years." Pet. 6:25-7:1.

Respondent argues Sandoval's claim is rendered unexhausted by Cunningham v. California, -- U.S. --, 127 S.Ct. 856 (Jan. 27, 2007), purportedly casting his Blakely claim in a fundamentally different light than existed at the time he initially exhausted the claim in the

state courts. The Cunningham Court held California's determinate sentencing law ("DSL") violated the Sixth Amendment because it allowed sentencing courts to impose an elevated term based on aggravating factors judges found to exist by a preponderance of the evidence. That case also construed the "statutory maximum" sentence to be the middle term, from which a court may upwardly depart only on findings beyond a reasonable doubt of aggravating facts beyond the elements of the offense, or in consideration of additional facts admitted by the defendant. Id. at 862.

Respondent suggests the federal Petition be held in abeyance and any decision be stayed to allow Sandoval to present his Blakely claim again in state court for reevaluation in consideration of Cunningham.[1] Alternatively, Respondent argues the Petition should be denied, notwithstanding Sandoval's purported failure to exhaust his state court remedies as Respondent construes them, contending: relief is precluded by Teague v. Lane, 489 U.S. 288 (1989) (non-retroactivity of new rules of criminal procedure); the state court's adjudication of the claim was objectively reasonable, and did not violate the Cunningham rule (assuming retroactivity); and any error was harmless.[2] Ans. P&A pp. 2:12-14, 5-14; *see* R&R 2:1-7, 6:1-7, 11:7-11. Sandoval filed no Traverse.

This matter is before the court on the Report and Recommendation ("R&R") of Magistrate Judge Jan M. Adler. The R&R frames the "dispositive issue" as whether Cunningham applies retroactively within the meaning of Teague, 489 U.S. at 299-316

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[1] Having set up the Cunningham "claim" as its own construct, Respondent purports to demonstrate why Sandoval cannot succeed on a that claim. Fourteen pages later, the Answer unexpectedly states: "In any event, the decision in *Cunningham* is not applicable to Petitioner in federal habeas corpus." Ans. 14:15-16. The court finds no indication in the docket that Sandoval "seeks application of Cunningham to his case." Ans. 5:1-2.

[2] "The denial of the right to a jury trial on aggravating circumstances is reviewed under the harmless error standard set forth in Chapman v. California (1967) 386 U.S. 18, as applied in Neder v. United States (1999) 527 U.S. 1." Sandoval, 41 Cal.4th at 838 (full citations omitted). "In Washington v. Recuenco (2006) [548 U.S. 212], the high court held that a similar harmless error analysis applies to the failure to submit a sentencing factor to a jury, finding no distinction, for purposes of harmless error analysis of Sixth Amendment violations, between a sentencing factor that must be submitted to a jury and an element of a crime." Id. "Under the framework identified in Neder and [United States v.] Zepeda-Martinez [470 F.3d 909 (9th Cir. 2006)], this court looks at the record to consider the state of the evidence in support of the sentencing factor to determine whether the error was harmless." Chioino v. Kernan, 2007 WL 3105081 * 8 (N.D.Cal. Oct. 23, 2007).

(holding although a "new rule" of *substantive* criminal law ordinarily will be applied retroactively to cases which have already become final, a "new rule" of criminal *procedure* may be applied retroactively on collateral review only if it falls within one of two narrow exceptions). R&R 2:8-9. The R&R recommends the court find "it is unable to either grant or deny habeas relief at this time irrespective of the Teague analysis" because, adopting Respondent's view, "state court remedies remain available" to Sandoval. R&R 2:8-12, 17:9-16 ("it is not 'perfectly clear' that Petitioner 'has no chance of obtaining relief' due to a Teague bar, under section 2254(d), or under the harmless error doctrine. . . ."); *see* R&R 11:16-19 ("the Court is precluded at this time from finding that 'it is perfectly clear that Petitioner has no chance of obtaining relief' as to his claim," so that "without adjudicating the merits of the claim at this time, the Court finds that it may not deny the Petition while state court remedies remain available to Petitioner"). Neither party filed Objections to the R&R.

This court approaches the issues somewhat differently, and with the benefit of clarifying authority decided subsequent to the R&R. In particular, it finds the prior conviction factor Sandoval's sentencing court relied on to impose the upper term for the rape conviction was sufficient to support that result without raising any constitutional or federal law issue, standing alone and irrespective of any other factors recited on the record. Moreover, even reaching a Teague analysis, it is now sufficiently clear to this court Cunningham announces a new rule of criminal procedure, but one that has not been and will not be applied retroactively. For all the reasons discussed below, the R&R is **REJECTED** and the Petition is **DENIED** on the merits.

II. BACKGROUND

As part of a plea bargain, Sandoval pled guilty to one count of forcible rape and admitted a weapon use allegation (Pen. Code §§ 261(a)(2), 12022.3(a)) after the jury was unable to reach a verdict on the rape charge and after the court denied his motion to withdraw his plea. He acknowledged he could receive a sentence of up to eighteen years in prison. The court agreed not to impose the maximum term on the enhancement and agreed to dismiss charges in another case. Lodg. 1 at CT 5-6, 80-82. At Sandoval's

sentencing, the court recited the aggravating factors it considered in imposing the upper term of eight years for the rape conviction:

> With respect to the appropriate sentence that might be imposed by the court in this case, as to the PC261(a)(2) charge, the court imposes the upper term of eight years. I do so taking into account 421(a)(3), the victim was vulnerable given the circumstances. **I don't give that circumstance great weight**. . . . His prior convictions are numerous and of increasing seriousness. He has a significant criminal history. Over the course of not many years the defendant sustained a number of convictions: BC23152 in '92. He was revoked several times in that matter. In '93, VC10852. In '93 again, VC10851, felony matter. In '94 PC 48789 matter. '94, an escape, another felony case pursuant to Penal Code Section 4532(b). And then ultimately this offense.
>
> The defendant has violated the law on a number of occasions. He has served separate prison terms pursuant to 4.421(b)(3). I take that into account. 4.421(b)(5), his past performance on probation was unsatisfactory. In his prior matters he had been, as referenced, revoked a number of times. Under 4.408(a) the defendant did flee to avoid prosecution of this matter . . . .
> . . .
>
> Taking all of those things into account, **I put a lot of weight in the criminal history**, on the facts and circumstances of this particular case, I believe the eight-year term, upper term, is appropriate. . . .

Lodg. 3, RT at 957-958 (emphasis added).

The procedural history of Sandoval's case, as intertwined with pertinent evolving legal standards before and after his sentencing, is as follows:

June 26, 2000 — The United States Supreme Court decides Apprendi v. New Jersey, 530 U.S. 466 (2000), expanding Sixth Amendment jurisprudence to extend a defendant's right to trial by jury, under the beyond-a-reasonable-doubt standard regarding the elements of the crime, to the fact-finding determinations used to enhance sentences. ***"Other than* the fact of a prior conviction**, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490, 491-97 (emphasis added) (holding a defendant's constitutional rights are violated when a judge imposes a sentence greater than the maximum he or she could have imposed under state law without the factual finding defendant challenges having been decided by the jury or admitted by the defendant). As clarified in Blakely, "[t]he 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."* Blakely v. Washington, 542 U.S. 296, 303 (2004), *citing* Ring v. Arizona, 536 U.S. 584, 602 (2002).

December 2, 2003	Sandoval's trial court sentences him to the upper term of 8 years for the rape conviction plus the presumptive middle term of 4 years for the use of knife allegation. Lodg. 3 p. 958. The court recites as the justification for imposing the 8-year upper term his having taken into account: "the victim was vulnerable given the circumstances," although the judge states "I don't give that circumstance great weight;" "**his prior convictions are numerous and of increasing seriousness**;" "he has a **significant criminal history**;" "over the course of not many years **the defendant sustained a number of convictions**" between 1992 and 1994; "he was revoked several times" in one of the matters, escaped in another felony case; he "did flee to avoid prosecution of this matter;" and "there was planning involved and some level of sophistication involved as this crime was carried out," including "the use of the duct tape, [and] the fact that he went in ready, willing, and able to use the knife." Lodg. 3, pp. 957-58 (emphasis added).
June 24, 2004	The United State Supreme Court decides Blakely v. Washington, 542 U.S. 296, 303-04 (2004) (holding "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings," and "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment, . . . and the judge exceeds his proper authority").
January 12, 2005	The United States Supreme Court decides United States v. Booker, 543 U.S. 220 (2005), applying the Blakely holding to find the federal Sentencing Guidelines violate the Sixth Amendment because they imposed mandatory sentencing ranges based on factual findings made by the sentencing court rather than by a jury applying the beyond-a-reasonable-doubt standard. Booker, 543 U.S. at 243-440. Reaffirming Apprendi, the Court held: "Any fact (***other than* a prior conviction**) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." Booker, 543 U.S. at 244 (emphasis added).
March 15, 2005	California Court of Appeal, in a two-to-one decision, affirmed Sandoval's conviction but remanded for resentencing, on grounds the trial court relied on six aggravating factors in support of its imposition of the upper term, only one of which (*i.e.*, Sandoval's prior convictions and service of prior prison terms) could be properly decided by the judge under Apprendi and Blakely, opining that the trial court's other recited aggravating factors -- victim vulnerability, crime sophistication and planning, and flight to Mexico to evade prosecution -- required jury determinations beyond a reasonable doubt. Lodg. 7.
April 19, 2005	Sandoval petitioned the California Supreme Court for review. Lodg. 8.
June 8, 2005	Petition For Review granted, but further action deferred pending that court's consideration and disposition of a then-pending "related case," People v. Black, S126182. Lodg. 9.

September 7, 2005	California Supreme Court transfers the matter back to the Court of Appeal with directions to vacate its decision and to reconsider the cause in light of its People v. Black ("Black I"), 35 Cal. 4th 1238 (2005) decision. Lodg. 10.
October 21, 2005	On remand from the California Supreme Court, the Court of Appeal affirms Sandoval's sentence to the upper term for rape as not a violation of his right to a jury trial on the aggravating factors the trial court relied on, pursuant to the higher court's rejection of that argument in Black I, 35 Cal.4th at 1253-61, 1254 (holding "the upper term is the 'statutory maximum' and a trial court's imposition of an upper term sentence does not violate a defendant's right to a jury trial under the principles set forth in Apprendi, Blakely, and Booker"). Lodg. 11.
December 2, 2005	Sandoval files his Petition For Review of the remanded decision in the California Supreme Court. Lodg. 12.
January 6, 2006	The California Supreme Court summarily denies his Petition For Review. Lodg. 13.
April 6, 2006	Sandoval's conviction became final. *See* Bowen v. Roe, 188 F.3d 1157, 1158-59 (9th Cir. 1999) (conviction final ninety days thereafter, when the time within which to file a petition for writ of *certiorari* expires); Sup. Ct. R. 13.
December 29, 2006	Sandoval files his federal habeas Petition, relying on the same Blakely argument he had asserted in the state courts as his sole ground for relief.
January 22, 2007	The United States Supreme Court decides Cunningham v. California, -- U.S. --, 127 S.Ct. 856, 860, 870-71 (U.S. (Cal.) 2007), overruling Black I and holding California's DSL violated the Sixth Amendment because it allows the sentencing court to impose an elevated sentence based on aggravating factors it found to exist by a preponderance of the evidence. "[O]ur decisions from Apprendi to Booker point to the middle term specified in California's statues, not the upper term, as the relevant statutory maximum," and "[b]ecause the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent."[3] Id. at 871.

[3] "The Federal constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, **other than a prior conviction**, not found by a jury or admitted by the defendant") Cunningham, 127 S.Ct. 856 (emphasis added), *citing, inter alia*, Apprendi, 530 U.S. at 490 (establishing a bright-line rule: **except for a prior conviction**, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"). The Blakely Court defined the relevant "statutory maximum" as "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." Blakely, 542 U.S. at 303-04. "If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." Cunningham, 127 S.Ct. at 869, *citing* Blakely, 542 U.S. at 305 & n.8. "[O]ur decisions from Apprendi to Booker point to the middle term specified in California's statues,

February 20, 2007	United States Supreme Court grants the Black I defendant's petition for writ of *certiorari* on his habeas petition, vacating Black I judgment and remanding the case to the Supreme Court of California for further consideration in light of Cunningham. Black v. California, -- U.S. --, 127 S.Ct. 1210 (2007).
March 9, 2007	Respondent answers the Petition, positing it should be denied because Sandoval's claim is unexhausted and thus not properly before the court, arguing Cunningham cast the Blakely claim in a significantly different light, so he should be required to return to state court to present his claim again in light of that new authority, with this action stayed while he exhausts the claim there. Respondent also argues in any event, Teague bars the claim, and any error in the state court proceedings was harmless.
June 8, 2007	Judge Adler enters his R&R Sandoval's Petition be stayed pending exhaustion of state court remedies, in consideration of Cunningham and retroactivity issues associated with the timing of that decision *vis-a-vis* Sandoval's sentencing and post-conviction proceedings.
July 19, 2007	The California Supreme Court decides People v. Black ("Black II"), 41 Cal.4th 799 (2007) (on remand). It determines, applying Cunningham and its antecedents: "[U]nder the DSL, **the presence of one aggravating circumstance renders it lawful for the trial court to impose an upper term sentence**. . . .The court's factual findings regarding the existence of additional aggravating circumstances may increase the likelihood that it actually will impose the upper term sentence, but these findings do not themselves further raise the authorized sentence beyond the upper term. **No matter how many** For Blakely issue purposes, the relevant statutory maximum sentence a judge may impose is the sentence available without finding any additional facts. Blakely, 542 U.S. at 303-304. **No matter how many additional aggravating facts are found by the court, the upper term remains the maximum that may be imposed. Accordingly, judicial fact finding on those additional aggravating circumstances is not unconstitutional."** Black II, 1 Cal.4th at 816.
July 19, 2007	In People v. Sandoval,[4] 41 Cal.4th 825 (2007), decided the same day as Black II and also applying Cunningham, the California Supreme Court held that imposing an upper term sentence on defendant violated her jury trial right, the Sixth

not the upper term, as the relevant statutory maximum," and "[b]ecause the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." Id.,127 S.Ct. at 871. California's DSL was amended post-Cunningham. *See* Sandoval, 41 Cal.4th at 845 ("while this case was pending, the California Legislature amended the DSL").

[4] No apparent relationship to this Petitioner or this case.

> Amendment error was not harmless, the appropriate remedy for Sixth Amendment error was remand for the trial court to exercise sentencing discretion to impose lower, middle, or upper term, and addressed "what type of resentencing proceedings must be conducted in those cases, like the present case, in which a Sixth Amendment error requires reversal of an upper term sentence and a remand for resentencing." Sandoval, 41 Cal.4th at 845. As distinguishable from this case, that reviewing court concluded ***none* of the aggravating factors recited by the sentencing court** (*i.e.*, crime of extreme violence, callous behavior, no concern for consequences, particularly vulnerable and unarmed victims who were inebriated and ambushed from behind and unable to defend themselves) came within the exceptions identified in Blakely, none was admitted by the defendant or established by the jury's verdict, **and the defendant had no prior criminal convictions**.

Thus, the California Supreme Court expressly addressed and has revealed how it will treat the Sixth Amendment sentencing issues implicating the Apprendi/ Blakely/ Booker/ Cunningham line of United States Supreme Court cases, after the R&R was entered. As discussed below, this court concludes it is now clear Sandoval cannot prevail should he return to state court to reassert his Blakely claim in consideration of Cunningham. Any remand would be futile, and for that reason, the court rejects the non-exhaustion recommendation to reach the merits of his Petition.

III. DISCUSSION

A. Legal Standards

1. Habeas Review

"The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Section 2254 habeas proceedings thus measure state convictions against federal constitutional requirements applicable to the states. Only errors of federal constitutional magnitude will support federal intervention in state judicial proceedings, and only to correct such errors. *See* Oxborrow v. Eikenberry, 877 F.2d 1395, 1400 (9th Cir. 1989); Jackson v. Ylst, 921 F.2d 882, 885 (9th Cir. 1990).

A writ petition decided under the 1996 standards enacted through the Antiterrorism And Effective Death Penalty Act ("AEDPA") will not be granted unless the state court decision denying a claim on the merits "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *see* Baylor v. Estelle, 94 F.3d 1321, 1325 (9th Cir. 1996); Carey v. Musladin, -- U.S. --, 127 S.Ct. 649 (Dec. 11, 2006). A state court decision is "contrary to" clearly established Supreme Court precedent if the decision "contradicts the governing law set forth in [the Supreme Court's] cases." Williams v. Taylor, 529 U.S. 362, 405 (2000). Under the "unreasonable application" clause, the test is objective unreasonableness of the state court's application of "the correct governing legal rule from this Court's cases" applied to "the facts of the particular state prisoner's case," irrespective of whether the decision was "erroneous" or "incorrect." Id. at 407, 411; Lockyear v. Andrade, 538 U.S. 63, 75-76 (2003). To satisfy the AEDPA requirement the federal law the petitioner relies on was "clearly established," a reviewing court must look to the law as it existed in United States Supreme Court rulings at the time the challenged state court decision was rendered. Williams, 529 U.S. at 412, 405, 413; *see* Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000).

2. R&R Review

A district judge "may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions" on a dispositive matter prepared by a magistrate judge proceeding without the consent of the parties for all purposes. Rule 72(b); *see* 28 U.S.C. § 636(b)(1). An objecting party may "serve and file specific objections to the proposed findings and recommendations," and "a party may respond to another party's objections." Rule 72(b).

In reviewing an R&R, "the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. §636(b)(1); United States v. Raddatz, 447 U.S. 667, 676 (1980) (when objections are made, the court must make a *de novo* determination of the factual findings to which there are objections). "If neither party contests the magistrate's proposed findings of fact,

the court may assume their correctness and decide the motion on the applicable law." Orand v. United States, 602 F.2d 207, 208 (9th Cir. 1979). The court reviews *de novo* the magistrate judge's conclusions of law. Gates v. Gomez, 60 F.3d 525, 530 (9th Cir. 1995); Robbins v. Carey, 481 F.3d 1143, 1146-47 (9th Cir. 2007) ("determinations of law by the magistrate judge are reviewed *de novo* by both the district court and [the court of appeals]"). Here, the court need only address the disposition of the Petition based on conclusions of law, as no party has filed objections to the R&R.

B. R&R Analysis

The R&R was prepared before later case law clarified whether the January 2007 Cunningham decision announced a "new rule" within the meaning of the Teague non-retroactivity principle and whether that rule would be considered substantive or procedural. The R&R concluded the court "is unable to deny the Petition as long as state court remedies remain available to Petitioner," and recommends the Petition be stayed because "it is not 'perfectly clear' that Petitioner 'has no chance of obtaining relief' due to a Teague bar, under section 2254(d), or under the harmless error doctrine."[5] R&R 17:9-11, *quoting* Cassett v. Stewart, 406 F.3d 614, 623-24 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 1336 (2006).

The Cunningham case appears not to have been applied retroactively by Ninth Circuit district courts since it was decided.[6] As demonstrated below, this court concurs with the many analyses concluding Cunningham merely introduces a new rule of criminal procedure

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[5] The R&R suggests "[t]here is a powerful argument that the [Cunningham] rule at issue here would be considered substantive rather than procedural, and therefore retroactively applicable," while opining the court need not decide the issue now. R&R13:27-14:11. This court is persuaded that Cunningham will not apply retroactively. *See, e.g.*, Rosales v. Horel 2007 WL 1852186 (S.D.Cal. Jun. 26, 2007); Ayala v. Ayers 2007 Wl 2019538 (S.D.Cal. Jul. 9, 2007); Hally v. Scribner 2007 Wl. 809710 (E.D.Cal. Mar. 15, 2007). The Ninth Circuit has already ruled that the new procedural rule announced in Blakely does not apply retroactively, and Cunningham relied heavily on Blakely. Blakely error is not "structural" requiring automatic reversal, but is subject to the harmless beyond a reasonable doubt standard. *See* Washington v. Recuenco, 548 U.S. --, 126 S.Ct. 2546 (2006), *relying on* Neder v. United States, 527 U.S. 1 (1999).

[6] *See* Som v Evans, 2008 wl171010 *4 (E.D.Cal. Jan. 18, 2008), *citing:* Jordan v. Evans, No. 07CV466-J (NLS), 2007 WL 2703118, at *21 (S.D.Cal. Sept.14, 2007); Beyett v. Yates, No. C 06-7598 WHA (PR), 2007 WL 2600745, at *2 (N.D.Cal. Sept.10, 2007); Zimmeth v. Hernandez, No. 05CV1695 JAH (RBB), 2007 WL 2556771, at *9 (S.D.Cal. Sept.4, 2007); Lopez v. Campbell, No. 1:05-cv-00481 LJO-TAG HC, 2007 WL 2500424, at *3 (E.D.Cal. Aug.30, 2007); Marquez v. Evans, No. C 06-0913 CRB (PR), 2007 WL 2406867, at *9 (N.D.Cal. Aug.20, 2007); Bouie v. Kramer, No. CIV S-06-1082 GEB GGH P, 2007 WL 2070330, at *3 (E.D.Cal. July 13, 2007). .

inapplicable retroactively to cases on collateral review. In addition, the California Supreme Court has since substantiated if a prior conviction is one of the aggravating factors a sentencing judge relies on to impose the upper term for a particular conviction, it will not disturb the sentence on Blakely/Cunningham grounds. *See* Black II, 41 Cal.4th 799. The rationale for the recommendation the Petition be stayed and held in abeyance accordingly has lost its force.

The alleged error in Sandoval's sentencing "is the imposition of the upper term based on facts, other than facts related to Petitioner's prior convictions, which were found by the trial judge under a preponderance of evidence standard." R&R 16:22-24. The R&R acknowledges "three of the six factors relied on by the sentencing judge involved Petitioner's prior convictions, including the prior convictions themselves, the fact that Petitioner served prior prison terms as a result of those convictions, and that Petitioner had performed badly on probation."[7] R&R 16:26-17:1. The R&R opines that had the sentencing judge relied *solely* on Sandoval's prior convictions in imposing the upper term, "the Sixth Amendment would not be implicated due to the Apprendi exception." R&R 8:16-20. Inasmuch as the sentencing judge "also relied on several other factors in imposing the upper term" unconnected to Sandoval's prior convictions, the R&R construes Cunningham as requiring a finding the upper term for his rape conviction was selected in a constitutionally infirm manner. R&R pp. 8-9, 16:26-17:1. Intervening case law casts doubt on the R&R's underlying premise.

The R&R correctly identifies the "state of the law at the time Petitioner sought relief in the state appellate and supreme courts, and at the time his conviction became final" as governed by the holdings in Apprendi, Blakely, Booker and, with respect to California's DSL,

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[7] The other three factors "included the findings that: (1) the victim was particularly vulnerable; (2) Petitioner fled the crime scene to avoid arrest; and (3) the crime involved sophistication and planning," all factors the R&R ascribed as raising "potential weightiness" concerns adequate to render "the 'record review [as] leav[ing] the conscientious judge in grave doubt' about whether the trial judge would have selected the upper term if he had not taken these factors into consideration." R&R 17:4-8, *quoting* Padilla v. Terhune, 309 F.3d 614, 621-22 (2002). This court reads the record as substantiating the trial court expressly considered the most important factor to be Sandoval's criminal record. Lodg. 3, RT at 957-958. The R&R inference, based on its "harmless error" analysis, suggests had it reached the merits, it would have recommended granting the Petition. With due respect, this court reaches a different result.

by "Black I", 35 Cal. 4th at 1255-56, *vacated in February 2007 by* Black v. California, 127 S.Ct. 1210 (granting *certiorari*, vacating judgment, and remanding to California Supreme Court for further consideration in light of Cunningham, overruling Black I). R&R 7:8-27. It appears to this court under clearly established Supreme Court authority a prior conviction finding has consistently furnished an exception to restrictions on fact-finding used to impose an upper term, both before and after Cunningham. The Apprendi exception for judicial fact-finding of a prior conviction does not require any jury determination or higher standard of proof before it may be used as a permissible aggravating factor in support of an upper term sentence. *See* Cunningham, 127 S.Ct. at 868-71 ("***Except for a prior conviction***," a sentencing judge may not rely on facts not found by a jury beyond a reasonable doubt or admitted by the defendant in imposing upper terms) (emphasis added).

In consideration of the July 2007 California Supreme Court's decision in Black II, 41 Cal.4th 799, holding one permissible aggravating factor (such as a prior conviction, which a judge may find) is sufficient to justify an upper term sentence, the court concludes a remand to state court with a stay of this federal action would be futile. As discussed below, the presence of prior criminal history is a factor exposing a defendant to eligibility for an upper term sentence, so the clear outcome Sandoval could expect on his record should he return to state court for reexamination of his Blakely claim is denial again.

C. Exhaustion

Sandoval's federal habeas claim alleging a violation of the United States Supreme Court holding in Blakely, 542 U.S. 296 is the same claim he presented to the California Supreme Court on direct review and on Petition For Review after remand. The claim is accordingly exhausted, but for the consideration Respondents urge on the court: "Petitioner's sole claim, that the trial court erred when it sentenced him to the upper term, without a jury's determination of the factors in aggravation, is unexhausted and thus not properly before this court" purportedly due to the subsequent Cunningham decision, warranting stay and abeyance of the federal Petition. Ans. 2:12-44.

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Respondent relies *inter alia* on Picard v. Connor, 404 U.S. 270, 276 (1971) for the proposition "**a state prisoner who believes** that some decision of the United States Supreme Court subsequent to the state court decision in his case requires that his conviction or sentence be set aside should first pursue any state remedy which may be available to present that contention before applying for a federal writ of habeas corpus." Ans. 4:24-28 (emphasis added), *quoting* Blair v. California, 340 F.2d 741, 7435 (9th Cir. 1965). Respondent's entire exhaustion argument, is predicated on its own construction of the law, not on any issue or request raised by the Petitioner. Respondent argues Cunningham casts his Blakely claim "in a fundamentally different light," warranting a return to state court to decide the issue anew. R&R 10:5-17 (adopting Respondent's view). The R&R observes "the Court need not decide whether the rule of Cunningham is substantive or procedural at this time" (while making the argument it may be substantive), because the second Teague exception (for a "watershed" change in the law) "may apply" due to "the unique nature of the standard of proof beyond a reasonable doubt." R&R 14:15-18; *see* R&R 14:11-15 (the two Teague "exceptions" to the non-retroactivity of new rules of criminal procedure are: (1) "it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe;" or (2) "is an absolute prerequisite to fundamental fairness that is implicit in the concept of ordered liberty"), *quoting* Teague, 489 U.S. at 311-314. On that basis, the R&R concludes Sandoval's Blakely claim should no longer be considered exhausted and recommends "this action be stayed pending exhaustion of the claim." R&R 10:15-17.

> This Court finds that state court remedies remain available to Petitioner, and the Court is unable to grant or deny the Petition at this time. The Court therefore recommends this action be stayed while Petitioner returns to state court to exhaust his state court remedies with respect to his claim, **or until such time as the California Supreme Court rules in such a manner as to make it clear that Petitioner is not entitled to relief in the state courts as to claim four** [*sic*] **presented in the petition**.

R&R 18:3-9 (emphasis added), *citing* Jackson v. Roe, 425 F.3d 654, 660 (9th Cir. 2005) (interpreting Rhines v. Weber, 544 U.S. 269 (2005) as permitting a district court to stay a *mixed petition* pending exhaustion of state court remedies).

The R&R concluded the federal court is unable to either grant or deny the Petition "irrespective of the outcome of the Teague analysis" because "state court remedies remain available with respect to Petitioner's claim," apparently because the state courts had not addressed "whether Cunningham applies retroactively within the meaning of Teague."[8] R&R 2:8-12. The R&R acknowledged the same issues Respondent raises here associated with Sandoval's Blakely claim were then pending before the California Supreme Court on remand from the vacating of Black I. This court reads the subsequent decisions in Black II and Sandoval as clarifying and narrowing state court remedies available to defendants raising Blakely issues. The court finds the uncertainty expressed in the R&R, in particular "whether imposition of the upper term based on numerous prior adult convictions is sufficient to satisfy the Sixth Amendment even if the trial judge also relied on other factors" (R&R 9:26-10:2) is now resolved, in light of the July 2007 Sandoval decision and Black II, defeating a construction of his claim as "unexhausted" (R&R 10:5-13).

The California Supreme Court has expressly narrowed the available state court remedies on a Blakely theory. *See* Black II, 41 Cal.4th at 816. It now appears "perfectly clear" this petitioner "has no chance of obtaining relief" should he return to state court seeking review in light of Cunningham because at least one of the aggravating factors the sentencing court considered, and the one given the most weight -- Sandoval's prior convictions -- is permissible and sufficient to preserve the sentence against attack under the Apprendi, Blakely, Booker,[9] and now Cunningham line of cases. *See* Black II, 41 Cal.4th at 818 ("The United States Supreme Court consistently has stated that the right to a jury trial

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[8] If the outcome of the Teague analysis is immaterial to whether habeas relief can be granted, as Respondent and the R&R present it, the recommendation must arise from the purported failure to exhaust (*i.e.*, "state court remedies remain available with respect to Petitioner's claim"). R&R 2:8-12, 4:6-9. For the reasons discussed herein, this court approaches the analysis differently and concludes it can reach and deny the Petition on the merits. Not only does this court construe the claim as exhausted, but even of it were not, it is now clear Sandoval "does not raise even a colorable federal [habeas] claim." *See* Cassett, 406 F.3d at 623-24.

[9] In Booker, 543 U.S. 220, the Court determined the mandatory nature of the Federal Sentencing Guidelines implicated Sixth Amendment rights and requires they be read as merely advisory provisions recommending, rather than requiring, the selection of particular sentences in response to differing sets of facts. "California's DSL . . . in this context, resembles pre-Booker federal sentencing in the same ways Washington's sentencing system did" when the Court examined it in Blakely. Cunningham, -- U.S. --, 127 S.Ct. at 866 n.10.

does not apply to the fact of a prior conviction . . . . '[R]ecidivism . . . is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence'"), *quoting* Almendarez-Torres v. United States, 523 U.S. 224, 243 (1998), *and also citing* Cunningham, 127 S.Ct. at 868, Blakely, 542 U.S. at 301. Black II leaves this court with virtually no doubt as to the outcome of Sandoval's aggravating factor theory should he return to state court for re-adjudication of the issue of judicial fact-finding in the sentencing context:

> Cunningham requires us to recognize that aggravating circumstances serve two analytically distinct functions in California's current determinate sentencing scheme. One function is to raise the maximum permissible sentence from the middle term to the upper term. The other function is to serve as a consideration in the trial court's exercise of its discretion in selecting the appropriate term from among those authorized for the defendant's offense. Although the DSL does not distinguish between these two functions, in light of Cunningham it is now clear that we must view the federal Constitution as treating them differently. Federal constitutional principles provide a criminal defendant the right to a jury trial and require the prosecution prove its case beyond a reasonable doubt as to factual determinations (**other than prior convictions**)[10] that serve the first function, but leave the trial court free to make factual determinations that serve the second function. **It follows that imposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions**.

Black II, 41 Cal.4th at 815-16 (emphasis added).

Thus, in Black II, applying Cunningham and its antecedents, the California Supreme Court determined "the presence of one aggravating circumstance renders it lawful for the trial court to impose an upper term sentence" so that "judicial fact finding on . . . additional aggravating circumstances is not unconstitutional." Black II, 41 Cal.4th at 816. This court

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[10] Black II rejected that defendant's narrow reading of the "prior conviction" Apprendi exception, in reliance on People v. McGee, 38 Cal.4th 682 (2006). "[T]he exception in Apprendi for 'the fact of a prior conviction' permits a trial court to decide whether a defendant has served a prior prison term." Black II, 41 Cal.4th at 819. "As we recognized in McGee, numerous decisions from other jurisdictions have interpreted the Almendarez-Torres exception to include not only the fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions." Id., *citing inter alia* United States v. Smith, 474 F.3d 888, 892 (6th Cir. 2007) (no right to a jury trial concerning the circumstance whether defendant's criminal history was "extensive and egregious").

sees no principled difference between an observation imposition of the upper term is constitutionally justified when "the presence of one aggravating circumstance renders it lawful for the trial court to impose an upper term sentence," no matter how many additional aggravating facts may also be found by the court (wrongly or rightly), and an observation that if the aggravating factor found by the court is an Apprendi exception (*i.e.*, a prior conviction, which does not require fact-finding beyond a reasonable doubt), the upper term is constitutionally justified.

The Cunningham rationale was predicated on the law expressed in Apprendi, Blakely, and Booker existing at the time Sandoval worked his way through the state courts and upon which he expressly relies in his Petition. The exhaustion requirement is satisfied for federal habeas review purposes when the petitioner has provided the state courts with a "fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim." Anderson v. Harless, 459 U.S. 4, 6 (1982). While an intervening change in federal law can cast a previously exhausted claim in a fundamentally different light, rendering the claim unexhausted (*see* Picard, 404 U.S. at 276), this court concludes that has not happened in Sandoval's sentencing circumstances.[11] Even though Cunningham announces a new rule, as discussed below, a Teague analysis disposes of the argument it renders Sandoval's claim unexhausted.

The court construes this petitioner's claim as remaining exhausted notwithstanding the subsequent Cunningham decision and reaches the merits of his federal habeas claim.

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[11] The R&R suggests the recommendation would be to *grant* Sandoval habeas relief but for the exhaustion issue, adopting Respondent's characterization that "the recent Supreme Court opinion in Cunningham casts Petitioner's claim in a significantly different light," so that "Petitioner should be required to return to state court to present the claim again in light of Cunningham while the Petition is stayed in this Court." R&R 5:25-6:4, *quoting* Ans. at 2. The court rejects the R&R finding "the state court's adjudication of Sandoval's claim was contrary to and/or involved an unreasonable application of clearly established federal law set forth in" Apprendi, Blakely, and Booker, "for the reasons explained in Cunningham." R&R 4:1-6. The court also rejects the suggestion the Petition is not exhausted, "preclud[ing] [this court] from granting [the] petition." R&R 4:9-10. The court accordingly rejects the recommendation the federal habeas petition be stayed for a return to state court neither sought by Sandoval nor likely to produce a different outcome on his Blakely claim. Cunningham applied the Apprendi "bright-line rule" that "***[e]xcept for a prior conviction***, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" Cunningham, 127 S.Ct. at 868, *quoting* Apprendi, 530 U.S. at 490. Sandoval was sentenced in consideration of his prior convictions, an express exception to the higher standard of proof.

In this court's view, there is no "new" claim in the Petition due solely to the issuance of a United States Supreme Court decision after the Petition was filed. Even if Cunningham altered the light in which his claim may be viewed, a Teague analysis disposes of any impediment to reaching the merits of Sandoval's claim.

D. Teague Analysis

In recommending the court stay this action, the R&R concludes the court "need not decide at this time whether Cunningham announced a new rule which may not be applied retroactively under Teague . . . because state court remedies remain available to Petitioner on his claim" R&R 4:3-90. The R&R nevertheless performs a Teague analysis.[12] This court likewise does so as a prerequisite to reaching the merits of the Petition, but with the benefit of subsequent clarifying authority.

The Teague doctrine is a "nonretroactivity principle" that "prevents a federal court from granting habeas corpus relief to a state prisoner based on a rule announced after his conviction and sentence became final." Caspari v. Bohlen, 510 U.S. 383, 389 (1994); *see* Horn v. Banks ("Banks I"), 536 U.S. 266, 271 (2002). "If the Teague doctrine is 'properly raised by the state,' a federal court must conduct a threshold Teague analysis prior to considering the merits of a petitioner's claim." Flores v. Hickman, -- F.Supp.2d –, 2008 WL 342748 (C.D.Cal. Jan. 25, 2008) at * 7 (denying habeas relief), *citing* Banks I, 536 U.S. at 272, Caspari, 510 U.S. at 389.

"Under the Teague framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review." Whorton v. Bockting, -- U.S. --, 127 S.Ct. 1173, 1180-84 (Feb. 28, 2007) (holding the Confrontation Clause rule announced in Crawford v. Washington, 541 U.S. 36 (2004) was new because not "dictated" by governing precedent existing at the time the challenged conviction became

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[12] "The Court does not need to determine at this time whether Cunningham announces a new rule within the meaning of Teague, whether such a rule is substantive or procedural, and, if procedural, whether it falls within the second Teague exception. Based on the discussion above it is not 'perfectly clear' that Petitioner 'has no chance of obtaining relief' due to a Teague bar. Cassett, 406 F.3d at 623-24. Rather, the resolution of the Teague issue is complex enough that it implicates the principles of comity and the legislative goals of AEDPA which the Ninth Circuit held in Cassett were necessary to avoid 'depriv[ing] state courts of the opportunity to address a colorable federal claim in the first instance and grant relief if they believe it is warranted.' Id. at 624." R&R 15:4-11.

final, but it did not apply retroactively because it is a procedural rule rather than a substantive rule, and one not rising to watershed status), *citing* Griffith v. Kentucky, 479 U.S. 314 (1987). "A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding.'" Whorton, 127 S.Ct. at 1180-81, *quoting* Saffle v. Parks, 494 U.S. 484, 495 (1990) (*quoting* Teague, 489 U.S. at 311); *see also* Schriro v. Summerlin, 542 U.S. 348, 351-52 (2004).

> "First, the court must determine when the defendant's conviction became final." Banks II, 542 U.S. at 411. . . . "Second, it must ascertain the 'legal landscape as it then existed,' and ask whether the Constitution, as interpreted by the precedent then existing, compels the rule . . . . That is, the court must determine whether the rule is actually 'new'." [Id.] . . . . "Finally, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity." [Id.]. . . .

Flores, 2008 WL 342748 at *7.

As calculated above, Sandoval's conviction became final in April 2006, well in advance of the Cunningham decision. The "legal landscape" at that time may be discerned from the Apprendi/Blakely/Booker line of cases. As succinctly traced in Flores, for Teague analysis purposes, a holding constitutes a new rule "if it 'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not '*dictated* by precedent existing at the time the defendant's conviction became final.'" Graham v. Collins, 506 U.S. 461, 467 (1992), *quoting* Teague, 489 U.S. at 301.

For Teague purposes, the first question is whether Cunningham "applied an old rule or announced a new one." *See* Whorton, 127 S.Ct. at 1181. Those district courts that have considered the issue appear uniformly to have concluded Cunningham announced a new rule, as its holding is similar to those in Apprendi, Blakely, and Booker, each of which announced a "new rule" for Teague purposes. *See, inter alia*, *discussion and authority in* Flores, 2008 WL 342748 at **8-9. "The new rule principle . . . validates reasonable good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." Whorton, 127 S.Ct. at 1181; Bohlen, 510 U.S. at 395-96.

This court concurs with the multiple district court cases after Cunningham and Black II concluding Cunningham announces a new rule.

When a "new rule" is procedural rather than substantive, the rule cannot be applied in a collateral attack on a conviction that had become final before the rule was announced unless it is a "watershed rul[e] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Saffle, 494 U.S. at 495. "This exception is 'extremely narrow.'" Whorton, 127 S.Ct. at 1181-82, *quoting* Summerlin, 542 U.S. 384 (tracing authority suggesting few, if any such rules have yet emerged to satisfy the requirements for watershed status justifying retroactive application).

> In order to qualify as watershed, a new rule must meet two requirements. First, the rule must be necessary to prevent "an ' "impermissibly large risk" ' " of an inaccurate conviction. . . . Second, the rule must "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding."

Whorton, 127 S.Ct. at 1182 (citations omitted), *quoting* Summerlin, 542 U.S. at 356; *see* Beard v. Banks ("Banks II"), 542 U.S. 406, 411 (2004); Caspari, 510 U.S. at 390).

Assuming the Cunningham rule is new, the court must then determine whether it falls within one of the two exceptions to the Teague non-retroactivity doctrine. The Teague bar "does not apply to (1) rules forbidding punishment 'of certain primary conduct [or to] (2) rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" Banks II, 542 U.S at 416-17; Summerlin, 542 U.S. at 351-52. The first exception does not apply to Cunningham's procedural rule because it does not affect who or what type of conduct may be punished. A rule "requiring a jury rather than a judge find the essential facts bearing on punishment" is a "prototypical procedural rule[]" and such rules "do not produce a class of persons convicted of conduct the law does not make criminal. . . ." Summerlin, 542 U.S. at 352-53; *see* Schardt v. Payne, 414 F.3d 1025, 1036 (9th Cir. 2005) ("Blakely allocated some of the decision-making authority previously held by judges to juries," making it a "procedural rule").

"The second exception is for watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Summerlin, 542 U.S. at 355-58, *citing* Banks II, 542 U.S. at 417, Whorton, 127 S.Ct. at 1181. "[A] change in the law

requiring a jury to make the factual findings on which an upper sentence is based, rather than a trial judge, does not announce a watershed rule." Flores, 2008 WL 342748 at *9, *relying on* Summerlin, 542 U.S. at 355-58, Schardt, 414 F.3d at 1036. "Thus, Cunningham 'announced a new procedural rule that does not apply retroactively to cases already final on direct review.'" Flores, 2008 WL 342748, *quoting* Summerlin, 542 U.S. at 358, *and citing* Schardt, 414 F.3d at 1034-36, Fennen v. Nakayema, 494 F.Supp.2d 1448, 1155-56 (E.D.Cal. 2007).

As traced above, it is now apparent Cunningham has not and likely will not be applied retroactively to habeas petitioners like Sandoval, whose convictions became final before that decision. *See discussion in* Eddington v. Adams. 2008 WL 397290 (E.D.Cal. Feb. 8, 2008); *see* Doughtie v. Scribner, 2007 WL 2669922 (E.D.Cal. Sept. 7, 2007) ("Cunningham does not apply retroactively to convictions which became final before it was decided"), *citing* Fennen, 494 F.Supp.2d 1148, Rosales v. Horel, 2007 WL 1852186 (S.D.Cal. June 26, 2007), Salerno v. Schriro, 2007 WL 2153584 (D. Ariz. July 24, 2007).

> That courts have consistently held Cunningham to be inapplicable on collateral review should not be surprising. Courts have similarly held the cases from which Cunningham is derived, *i.e.*, Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); and United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), to be non-retroactive as well.

Storie v. Kramer, 2008 WL 435294 (E.D.Cal. Feb. 14, 2008) at *2,[13] *citing* United States v. Sanchez-Cervantes, 282 F.3d 664, 666-667 (9th Cir.2002) (Apprendi); Schardt, 414 F.3d at 1036 (Blakely); United States v. Cruz, 423 F.3d 1119, 1121 (9th Cir.2005) (Booker); *see also* Garcia v. Evans, 2008 WL 214363 at *13 (E.D.Cal. Jan. 24, 2008) ("Because the state court's decision was issued prior to Cunningham, the issue becomes whether that decision

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[13] "See Jordan v. Evans, 2007 WL 2703118, at *21 (S.D.Cal., Sept.14, 2007); Beyett v. Yates (2007 WL 2600745, at *2 (N.D.Cal. Sept.10, 2007); Zimmeth v. Hernandez, 2007 WL 2556771, at *9 (S.D.Cal. Sept.4, 2007); Lopez v. Campbell, 2007 WL 2500424, at *3) (E.D.Cal. Aug.30, 2007); Marquez v. Evans, 2007 WL 2406867, at *9 (N.D.Cal. Aug.20, 2007); Bouie v. Kramer, 2007 WL 2070330, at *3 (E.D.Cal. July 13, 2007); Fennen v. Nakayema, 494 F.Supp.2d 1148, 1155 (E.D.Cal.2007); Rosales v. Horel, 2007 WL 1852186 (S.D.Cal., June 26, 2007); Salerno v. Schriro, 2007 WL 2153584 (D.Ariz., July 24, 2007)." Storie, 2008 WL 435294 at *2.

should be applied retroactively to Petitioner on collateral review, which has not yet been addressed by the Ninth Circuit," but for the reasons discussed in the ruling, applying Teague, "this Court, like several other district courts, finds in the negative").[14]

Inasmuch as the court finds Sandoval's Blakely claim to be exhausted, it need not reach an analysis of the stay and abeyance criteria. The court rejects the R&R recommendation Sandoval's federal petition be stayed to permit him the opportunity to return to state court on Respondent's theory Cunningham materially alters the analysis of the merits of his claim and may apply retroactively.

E. Petition Merits

This court construes Sandoval's Petition as containing one exhausted Blakely claim: the trial court's imposition of the upper term sentence in December 2003 allegedly violated the Blakely rule because the aggravating factors were neither found by the jury nor admitted by Petitioner. The court finds the claim to be without merit, as not contrary to clearly established United States Supreme Court authority at the time of his sentencing nor an unreasonable application of such authority. Sandoval is simply mistaken in his contention "none of the aggravating factors was permissible under Blakely, [so] the trial court is effectively precluded from imposing the upper term." Pet. 6:16-17.

In both Apprendi and Blakely, state law set an ordinary sentencing range for the crime at issue but allowed the court to impose a sentence in excess of that range if it determined specified facts existed that were not intrinsic to the crime. In January 2005, the Court decided Booker, applying the Blakely holding to find the Federal Sentencing Guidelines unconstitutional if applied as mandatory rather than advisory, but constitutionally acceptable if discretionary: "For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." Booker, 543 U.S. at 233.

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[14] "Although in Cunningham, the Supreme Court invalidated California's upper-term sentencing scheme based on facts not found by the jury, it specifically acknowledged, as it did in prior cases, that sentences based on a defendant's prior convictions does not violate the Sixth Amendment." Garcia, 2008 WL 214363 at *15, *citing* Cunningham, 127 S.Ct. at 860, 864, 868; Blakely, 542 U.S. at 301; Apprendi, 530 U.S. at 490; and Almendarez-Torres[], 523 U.S. 224.

The Apprendi, Blakely, Booker, and Cunningham decisions all support the conclusion trial courts are empowered to impose an upper term sentence predicated on findings regarding the defendant's prior criminal history without offending the defendant's constitutional right to trial by jury of facts used to enhance punishment after a conviction, both before and after Cunningham, irrespective of any other considerations. *See* Cunningham, 127 S.Ct. at 127; Blakely, 542 U.S. at 301; Apprendi, 530 U.S. at 490, 476-77 (prior convictions are *excepted* from the requirement that any fact that increases the penalty for a crime beyond the prescribed statutory maximum be submitted to a jury or admitted by the defendant); Almendarez-Torres, 523 U.S. at 490; *see also discussion of multiple Circuits accord in*, *e.g.,* Garcia, 2008 WL 214363 at *15. Under California law, only one aggravating factor need be found to enhance a middle term to the upper term: "A single aggravating factor is sufficient to impose an aggravated upper prison term where the aggravating factor outweighs the cumulative effect of all mitigating factors. . . ." People v. Nevill, 167 Cal.App.3d 198, 202 (1985); *see also* Jordan v. Evans, 2007 WL 2703118 (S.D.Cal. Sept. 14, 2007) (finding Cunningham did not apply to the petitioner's claim because it was decided after the petitioner's conviction became final (applying Teague), and finding and the trial judge's imposition of an upper-term sentence did not violate clearly established federal law because it was based in part on prior convictions); Zimmeth v. Hernandez, 2007 WL 2556771 (S.D.Cal. Sept. 2007 **7-12); *see also, e.g.*, People v. Osband, 13 Cal.4th 622 (1996). "Therefore, if one aggravating circumstance has been established in accordance with the constitutional requirements set forth in Blakely, the defendant is not 'legally entitled' to the middle term sentence, and the upper term sentence is the 'statutory maximum.'" Black II, 41 Cal.4th at 813 ("the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term").

Sandoval's upper term sentence was properly based in part on his prior convictions and recidivism, a finding he has no right to demand a jury decide. Although the trial judge found several aggravating factors in addition to Sandoval's criminal history, the latter factor alone permissibly exposed him to the sentencing range's upper term. Even if there were Blakely error in Sandoval's case, he has not established the requisite harm. Recuenco, 548

U.S. 212 (Blakely errors are not structural errors and are subject to harmless error analysis); *see* Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (in a habeas proceeding, the proper standard of review is whether the error had a "substantial and injurious effect"); *see also* fn 2, above. Any error in imposing the upper term for Sandoval's rape conviction was harmless. A jury presented with the ample, undisputed evidence of his recidivism would undoubtedly have rendered a verdict beyond a reasonable doubt regarding his criminal record.

IV. CONCLUSION AND ORDER

For all the foregoing reasons, the court finds no exhaustion issue prevents a decision on the merits of Sandoval's Petition. On the merits, the court finds the state court's denial of Sandoval's Blakely claim was neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court and did not violate his Sixth Amendment rights nor deny him due process, precluding federal habeas relief. Accordingly, **IT IS HEREBY ORDERED** the R&R recommending stay and abeyance of the federal Petition for exhaustion of state remedies is **REJECTED**, the Petition is **DENIED**, and this matter is terminated in its entirety.

IT IS SO ORDERED.

DATED: March 13, 2008

HONORABLE LARRY ALAN Burns
United States District Judge